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No. ~~84676-1~~
(Consolidated Cases)

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SUPREME COURT OF
THE STATE OF WASHINGTON

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In the Matter of the
GUARDIANSHIP OF MARY JANE McNAMARA

James R. Hardman and Alice L. Hardman, Guardians
Appellants

v.

State of Washington,
Department of Social & Health Services

Respondent.

APPELLANTS' OPENING BRIEF

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March 2, 2011

ORIGINAL

TABLE OF CONTENTS

I.	SUMMARY OF ARGUMENT & ISSUES PRESENTED	1
II.	STATEMENT OF FACTS	2
	A. Facts	2
	B. Procedural Facts	8
III.	ANALYSIS: The Legal Framework	11
	A. Guardianship Cases Generally	11
	B. Incapacitated Persons (f/k/a Wards)	13
	C. Guardianship Protection & Empowerment	14
	D. Third Party Causes of Action & Financial Claims	15
	E. Alternatives to Guardianship	16
IV.	ANALYSIS: "Best Interests"	16
V.	ANALYSIS: Advocacy & Empowerment	17
	A. Background	17
	B. Content of Advocacy	18
	C. Why Advocacy is Necessary in Each Case	19
	D. Direct Benefit Rule Should Not Be Applied Exclusively	21
	E. The Guardians Provided a Direct Benefit	21
	F. The Guardian Fees are Reasonable	22

VI. ANALYSIS: Counsel Fees	24
The Court Should Reject Exclusive Application of the “Unique Issues” and “Prevailing Party” Rules Declared in <i>Lamb</i>	25
VII. ANALYSIS: The DSHS Claim is Meritless	27
A. Generally	27
B. Nature of DSHS Claim	28
C. Statutes Governing Financial Claims for Cost of Care	28
D. The DSHS Claim is Without Merit	29
VIII. CONCLUSION	30

TABLE OF AUTHORITIES

Cases

<i>Estate of Montgomery</i> , 140 Wash. 51, 53, 248 P. 64 (1926)	14
<i>Guardianship of Brown</i> , 6 Wn.2d 215, 101 P.2d 1003 (1940)	15
<i>Guardianship of Lamb</i> , 154 Wn.App. 536, 228 P.3d 32 (2009), No. 84379-1 (review granted)	passim
<i>Guardianship of Sall</i> , 59 Wash. 539, 542-43, 110 P. 32 (1910)	12
<i>In re Donnelly's Estates</i> , 81 Wn.2d 430, 502 P.2d 1163 (1972).....	12
<i>In re Rohne</i> , 157 Wash. 62, 74, 288 P. 269 (1930)	14
<i>Seattle-First National Bank v. Brommers</i> , 89 Wn.2d 190, 200, 570 P.2d 1035 (1977).....	12
<i>Vasquez v. Hawthorne</i> , 145 Wn.2d 103, 33 P.2d 735 (2001)	12
<i>Weber v. Doust</i> , 84 Wash. 330, 333-34, 146 Pac. 623 (1915)	12

Statutes

Chapter 11.88 RCW	12
Chapter 11.92 RCW	12
RCW 11.88.010(2).....	14
RCW 11.88.020.....	14
RCW 11.88.120.....	15
RCW 11.92.035.....	15, 28
RCW 11.92.150.....	15
RCW 11.92.180.....	28, 29
RCW 11.96A.150.....	24, 26

RCW 43.20B.410 et seq.....	29
----------------------------	----

RCW 71A.20.100(2), (5).....	29
-----------------------------	----

Rules

CR 19	15
-------------	----

CR 24	15
-------------	----

Regulations

Chapter 388-79 WAC	28, 29
--------------------------	--------

WAC 388-835-0350.....	29
-----------------------	----

Constitutional Provisions

Wash. const. Art. IV, § 6.....	12
--------------------------------	----

Wash. const. Art. XIII	19
------------------------------	----

I. SUMMARY OF ARGUMENT AND ISSUES PRESENTED.

The Guardians represent the interests of some of the most vulnerable people of the State who receive a high level of care at Fircrest School, a state facility. They advocate to protect the stability of Mary Jane's care delivery system, and to protect her health and safety. The Guardians' services promote Mary Jane's best interests, provide a direct benefit to the guardianship of her person, and express her Constitutional right to petition the government.

DSHS does not like the content of the advocacy and objects generally to it. In addition, DSHS has a financial claim to cost of care which it suggests reduces guardian and counsel compensation even though it did not comply with the claim statute and any claim against the guardianship estate is futile.

The questions presented are:

1. May courts apply a rule of guardian compensation requiring a "direct" benefit to the person to the exclusion of all other rules of compensation, and if so, under what circumstances? Is the guardian entitled to compensation in this case?

2. May courts apply a rule of attorney compensation because of unique issues, or because a party is not the prevailing party, to the exclusion of RCW 11.96A.150, and if so, under what circumstances, and should attorney fees be awarded on appeal? Is guardian's counsel entitled to compensation in this case?

3. Should the order granting the motion to strike materials submitted with the motion for consideration be vacated because it was the first opportunity to provide the superior court a record on the

compensation rules set forth by the Court of Appeals in Lamb?

II. STATEMENT OF FACTS.

A. FACTS.

Mary Jane McNamara is 49 years old. Fircrest has been her home for 15 years. Prior to Fircrest she lived at Interlake RHC (residential habilitation center) near Spokane. She lives in the skilled nursing section of Fircrest. Mary is profoundly developmentally disabled and thus has no speech capability. She has cerebral palsy, microcephaly, quadriplegia, kyphosis, rotoscoliosis, osteoporosis, degenerative joint disease, aphasia, dysphagia (requiring tube feeding), and hearing impairment. But perhaps her most acute non-cognitive disability is her mixed seizure disorder. She is also prone to hypertension, silent aspiration, and hypothermia. She requires total assistance for all activities of daily living. Skin integrity must be closely monitored due to her inability to ambulate and incontinence. Her G tube site is also prone to skin breakdown and must be closely monitored. Staff must reposition Mary at least every two hours as she cannot do this herself. Failure to reposition her would result in skin ulcers which are potentially life threatening. She suffers from contractures which require splints. A hooyer lift is necessary to lift her, this requires 2 staff for Mary's safety. Mary must be manipulated to maintain range of motion and all handling must be gentle to avoid pain from degenerative

joint disease, and to minimize the potential for breaking bones due to her osteoporosis. Her seizure medications require continual review so she may be as alert as possible while minimizing seizure activity. CP 253-254; 362-372.

Suzanne Mackenzie is 70 years old, non verbal, and profoundly developmentally disabled. She has a complicated medical situation with a seizure disorder, cerebral palsy, spastic quadriplegia (and is non ambulatory), osteoporosis, scoliosis, and a swallowing failure necessitating tube feeding through her abdomen directly into her stomach. She resides in the skilled nursing section of Fircrest. CP 2133, 2136-2146 (sealed); *Decl. of James R. Hardman Regarding Best Interests*, at 1-2 (CP to be supplemented).

Richard Milton is 53 years old and profoundly developmentally disabled and thus has no speech capability. He has microcephaly, cerebral palsy, optic atrophy, spastic quadriplegia, thorocolumbar scoliosis, dysphagia (requiring tube feeding), and major motor seizures. He is prone to hypothermia, UTIs, H. pyloric infections, and constipation. Richard uses splints to control contractures. His skin integrity must be closely monitored due to his lack of mobility and incontinence. He requires a Hoyer lift for transfers and two staff for his safety in transfers. He uses a tilt-in-space custom contour wheelchair with a lap and shoulder harness

and tray to maintain his posture. Richard requires assistance with all activities of daily living. Staff must change his Attends every 2 hours or more, and reposition him every 2 hours to prevent skin ulcers. Richard is a quiet person but enjoys social interaction with familiar staff. He will occasionally smile, laugh and vocalize. He is in a switch program, done in conjunction with the University of Kansas, allowing him to activate music or vibrations using a switch activated by head movement. Richard enjoys watching others and manipulating soft objects. He enjoys van rides and enjoyed aquatic therapy until DSHS closed the therapy pool in 2009. Richard communicates primarily with facial expressions and some vocalizations. He requires familiar staff to recognize his communications. He indicates rejection by pushing objects away, or by looking away. He lacks cognitive ability to understand or communicate about residential alternatives. CP 2227, 2233-2243 (sealed); *Decl. of James R. Hardman Regarding Best Interests*, at 1-2 (CP to be supplemented).

Bruce Moser (Kirby goes by and responds to his middle name) is 53 years old. Fircrest has been his home for 45 years. He lives in the skilled nursing section of Fircrest. Bruce has profound developmental disability and therefore has no speech capability. He is blind, has spastic quadriplegia, dysphagia (requiring a high fiber "blenderized" diet), a general seizure disorder, multiple musculoskeletal abnormalities, a

dislocated left hip, scoliosis, reflux disease, osteoporosis and osteopenia, among other conditions. Bruce is incontinent of bowel and bladder. He must be changed at least every two hours to prevent skin breakdown. Bruce uses a tilt in space wheelchair, he is non ambulatory and depends on staff to reposition him every two hours to prevent skin ulcers. Bruce uses splints to maintain range of motion and prevent contractures. He requires regular physical therapy. Bruce depends on staff for all activities of daily living. He can feed himself with adaptive utensils, plate, cup, and mat. Staff assistance is sometimes necessary to help Bruce finish meals. Bruce requires a two person Hoyer lift for transfers. He uses a Hi/Lo bed with concave mattress and posey bolster for good alignment/posture to maintain symmetrical positioning. Bruce enjoys social interactions. He can smile and laugh in response. He can initiate interactions with vocalizations, body movements, and facial expressions. He enjoys music and things which produce sounds, such as maracas. He will listen to television. He enjoys outings and parties. He enjoyed the therapy pool until DSHS shut it down last spring. Aquatic therapy was good for his range of motion and regularity. It relaxed his contractures. Bruce recognizes his name and the sound of familiar people. According to his Speech Language Pathologist "... he does not have sufficient language abilities to understand or answer questions contained in a questionnaire

regarding community living preferences.” CP 2052-2061 (sealed); *Decl. of James R. Hardman Regarding Best Interests*, at 1-2 (CP to be supplemented).

David Schmidt is 70 years old. Fircrest has been his home for 45 years. He now lives in the skilled nursing section of Fircrest. David has profound cognitive disability and therefore has no speech capability. He has a major motor seizure disorder, atypical bipolar disorder, hypertension, kyphoscoliosis, and mitral heart valve prolapse, among other conditions. He is essentially non ambulatory now. David is a very sweet man who enjoys music, primarily oldies. Big band and rock and roll appeal to him and he will listen intently and move to the beat. His heart condition is now well controlled but has been a significant problem before transferring from the ICF/MR (intermediate care facility/mental retardation) to the skilled nursing section earlier last year. David requires a dysphagia mechanical diet with medium thick liquids. He needs assistance with dental hygiene and must be pre-sedated for dental exams and treatment. David enjoys social interactions and has a warm smile. He communicates with facial expressions and some gestures. He will greet preferred staff. He responds to his name and can follow simple instructions in routine activities. David enjoys watching activities around him. CP 1954, 1960-1976 (sealed); *Decl. of James R. Hardman*

Regarding Best Interests, at 1-2 (CP to be supplemented).

Daniel Werlinger is 65 years old. Fircrest has been his home for 44 years. Dan lives in a senior unit of the Fircrest ICF/MR (Intermediate Care Facility/Mental Retardation). Dan is profoundly intellectually disabled and therefore has no speech capability. He has quadriplegic rigidity, which gives him gait imbalance and an inability to sit normally; he is unable to effectively use a toilet, he uses Attends. Dan often prefers to rest on the floor in a reclining posture. He can use a chair or couch and has ready access to such furniture which staff encourages him to use. Dan has difficulty bending at his hip so his chairs must have a wedge for support. Dan has dysphagia (a swallowing disorder) and is given a texture appropriate diet -- "blenderized" and pudding thick liquids. Staff must feed Dan and he is reliant on staff for assistance with all his activities of daily living. Dan requires sedation for medical and dental exams and procedures. Dan has no teeth. Dan can walk short to medium distances with a wide based gait, his back hyper-extended, arms stiff and swinging away from his body for balance, with a stiff high kick with his legs bent at the knees. He has no hip rotation. He can sit and stand independently. On uneven surfaces he side steps. He can manage stairs with assistance. CP 1862-1881 (sealed); *Decl. of James R. Hardman Regarding Best Interests*, at 1-2 (CP to be supplemented).

As noted, Dan is resident of the intermediate care facility for the intellectually disabled. Mary Jane, Suzanne, Richard, Bruce, and David are residents of the nursing facility which has specialized services for the intellectually disabled.

Jim and Alice Hardman are court-appointed certified professional guardians (CPGs) of the person and estate of Mary Jane and the others.

The Department of Social and Health Services (DSHS) opposes advocacy by the guardians and asserts a financial claim for cost of care which they say reduces the amount of compensation payable to guardian and counsel.

Collectively, the incapacitated persons are referred to as Mary Jane and citations are to her record unless a distinction is relevant.

Citations made to arguments in pleadings are incorporated by reference.

B. Procedural Facts.

1. Initial Hearings.

The Guardians filed triennial reports for Mary Jane in late 2008 or early 2009. CP 187-217. The Report was accompanied with a petition for approval. CP 180-186. DSHS filed an Objection to Approval of Fees. CP 222-233. Guardian James R. Hardman filed two declarations regarding the best interests of Mary Jane. CP 253-258, 281-289. Other declarations were

also filed. The Guardians filed a Reply. CP 246-252.

The Report and activities for the past reporting period were approved. The issue of guardian and counsel fees was reserved. CP 241-243.

2. Guardianship of Lamb.

Guardianship of Lamb, 154 Wn.App. 536, 228 P.3d 32 (2009), No. 84379-1 (review granted) was announced at about the same time the court commissioner was deciding the issues described above.

Lamb determined for the first time proof of a direct benefit was required for compensation in a guardianship of the person. *Lamb* determined the record before it was insufficient to show a direct benefit. *Lamb* also limited guardian's counsel's fees to non-unique issues in the superior court, and only when the prevailing party on appeal. See *Statement of Grounds for Direct Review* in this case.

The commissioner's Memorandum Decision of December 18, 2009 relied on *Lamb*. CP 292-298. A presentation hearing was held on January 29, 2010 and Orders were entered after hearing. CP 301-309.

3. Motion for Reconsideration.

In this case, Guardians proceeded on the same theory as in *Lamb*, i.e., compensation if best interests served. However, *Lamb* decided that the record in that case did not support direct benefit. Accordingly, in their

Motion for Reconsideration, Guardians disagreed with the “direct benefit” test and asked the Commissioner to clarify the meaning of direct or substantial benefit and to determine whether or not a direct or substantial benefit was conferred in this case. CP 343-344. The Guardians also asked that counsel fees for defending against litigation be paid by DSHS to Guardians’ counsel pursuant to RCW 11.96A.150. CP 345-346.

Guardians provided briefing in support of its Motion for Reconsideration, CP329-342, and additional evidence to demonstrate for the first time on a record that a direct benefit had been conferred: an excerpt from *Washington State Guardian Manual*, CP 358-361; a *Declaration of Tom O'Brien, Liz Lindley and John Jardine*; CP 313-328; *Declaration of Michael L. Johnson (2/12/2010)*, CP 915-977; the Sealed Personal Health Care Records for each resident; and, a *Declaration of James R. Hardman in Support of Motion for Reconsideration*, CP 373-914 (McNamara); CP 1131-1137, 1175-1404 (Werlinger).¹ In addition, declarations of counsel fees were filed. *Declaration of Michael L. Johnson re Fees (2/8/2010)*, CP 310-312; *Declaration of Michael L. Johnson re Fees (2/25/2010)*, CP 994-995.

4. Motion to Strike and Hearing

¹ The Declaration and nearly all exhibits in Werlinger (CP 1138-1176 and CP 1405-1861) are duplicative because partial designations are not permitted.

DSHS moved to strike all materials provided with the Motion for Reconsideration. CP 978-986. The guardians objected. CP 989-993. The commissioner denied the motion for reconsideration, CP 999, and granted the motion to strike in part, CP 989-993.

5. Motion to Revise.

A Motion to Revise was timely filed. CP 1000-1024. The Guardians moved to have all the commissioner's orders vacated, the relief sought by the Guardians in their Proposed Orders granted, and counsel fees for defending against litigation by DSHS awarded. DSHS filed a Response. CP 1044-1056. The Guardians replied. CP 1057-1059. Washington Association of Professional Guardians (WAPG) filed an amicus brief. CP 1034-1043. The revision judge denied the motion and affirmed the commissioner's orders in all respects. CP 1061-1062.

6. Appeal

A Notice of Appeal, CP 1063-1066, and a Statement of Grounds for Direct Review were timely filed. A motion to consolidate with *Lamb* will be filed shortly.

III. ANALYSIS: THE LEGAL FRAMEWORK.

A. Guardianship Cases Generally.

Guardianship cases are part of the exclusive, original jurisdiction

of the superior court. Wash. const. Art. IV, § 6. Cases are administered and decided as cases in equity. *Guardianship of Sall*, 59 Wash. 539, 542-43, 110 P. 32 (1910). Guardianship statutes are thus declaratory of the power already given to the court. *Weber v. Doust*, 84 Wash. 330, 333-34, 146 Pac. 623 (1915). Such statutes are given an equitable construction. *In re Donnelly's Estates*, 81 Wn.2d 430, 502 P.2d 1163 (1972).

The statutory scheme provides for appointing guardians, Chapter 11.88 RCW, and administration of guardianship cases, Chapter 11.92 RCW. This scheme is intended to empower individuals who cannot make decisions or advocate for themselves. In guardianship cases, the focus remains on the equities involved between the parties-in-interest -- based on the specific facts presented in the case and guided by case law principles -- rather than one's status as guardian. *Vasquez v. Hawthorne*, 145 Wn.2d 103, 33 P.2d 735 (2001). Thus, cases are decided predominantly on declarations.

A reviewing court determines cases on the best interests of the incapacitated person. "[U]ltimately, it is the court's duty to protect the ward's interests." *Seattle-First National Bank v. Brommers*, 89 Wn.2d 190, 200, 570 P.2d 1035 (1977). The end is justice in a particular case for the incapacitated person, not promotion of public policy for DSHS or other interest groups who may have an adverse interest.

The statutes reflect that the guardian and the incapacitated person are the only real parties-in-interest. In a civil case, there is a plaintiff and a defendant, and in a guardianship case, the guardian and the incapacitated person. Guardianship cases consist of stages of proceeding. See *Comments re Reviewability*, “General Summary of Guardianship Process” Ex. A. Generally, guardian and counsel fees are awarded for appointment, administration, and for defending against adverse interests of others.

This case arose on the review and approval of the Guardians’ Report. The court on review of the report approves the report, the activities of the guardian, and the fees for the last reporting period (or not). The court also pre-approves advances for the next reporting period (or not). Counsel fees are also approved (or not). Revision and appeal can follow in the same manner as any other case.

B. Incapacitated Persons (f/k/a “Wards”)

As noted earlier, every court’s job is to protect the “best interests” of the incapacitated person at every level of proceedings. The trial court has already determined that it is in the best interests of the incapacitated person to have a guardian. The basic standards for guardian decision-making are substituted judgment (applying known or historical preferences of the incapacitated person) and best interests. Mary Jane’s best interests are controlling in this case. See *Lamb Opening Br.*, at 7-9.

For a further analysis of Mary Jane's best interests see Part IV, "Analysis – Best Interests", below.

C. Guardianship Protection and Empowerment.

When a guardian is appointed, the court adjudicates two issues: the incapacity of the individual, and the qualifications of a guardian. RCW 11.88.010(2); RCW 11.88.020. The Guardians in this case are especially well-qualified to protect and advance Mary Jane's best interests. CP 192-193. When the court reviews a guardian's activities, it does so with deference and with the trust accorded to any officer of the court. *In re Rohne*, 157 Wash. 62, 74, 288 P. 269 (1930). Suspicion or disagreement is not enough to dispel this deference – there must be evidence of actual wrongdoing. *Id.* The Guardians applied the best interests standard in this case. CP 194, 199, 358-361. For further analysis of how the Guardians have empowered and protected Mary Jane, see Part V, "Analysis – Advocacy & Empowerment", below.

Court deference to guardian discretion has parallel compensation rules. In guardianship administration, a guardian bringing some benefit or value to the incapacitated person is entitled to compensation absent material wrongdoing. *Estate of Montgomery*, 140 Wash. 51, 53, 248 P. 64 (1926). A remedy for material wrongdoing is fee reduction. Fees for the guardian appointment process are not an issue here.

In litigation matters, a guardian also has a duty to appear and defend against all proceedings against the incapacitated person and against third party interests. *Guardianship of Brown*, 6 Wn.2d 215, 101 P.2d 1003 (1940); *Lamb Opening Br.*, at 11.

D. Third Party Causes of Action and Financial Claims

As noted earlier, the guardian and incapacitated person are the real parties-in-interest in a guardianship case. Different stages of procedure provide for standing of other persons. See *Comments re Reviewability*, “General Summary of Guardianship Process” Ex. A. DSHS does not have general standing to appear in guardianship cases and litigate against guardians and has not carried its burden of proof that it has standing in this case. For argument, see *Motion to Revise*, CP 1002-1004.

Other persons who may be interested in a case may be entitled to notice if they file a Request for Special Notice of Proceedings under RCW 11.92.150. Fact witnesses who have any information bearing on the best interests of the individual may appear at any time and the court will hear them. Any person can send a letter to the court and ask the court to modify or terminate a guardianship or remove or replace the guardian. RCW 11.88.120. However, those with their own financial interests to protect or legal arguments to advance against the guardianship need to intervene or be joined, CR 19, CR 24; use the claims procedure under RCW 11.92.035;

or, file an action against the guardianship estate.² In this case, the Guardians were obliged to defend the estate against what is essentially a financial claim by DSHS. For further analysis of the Guardians' entitlement to counsel fees against the DSHS financial claim, see Part VI, "Analysis – Counsel Fees for Defending the Guardianship", below.

E. Alternatives to Guardianship

There are several alternatives to guardianship, including powers of attorney, trust arrangements, and custodial accounts for minors. The alternative that has relevance in this case is a representative payee who accepts monthly federal benefit checks for social security, VA benefits, and the like. Representative payee is an administration of benefit income that is parallel or ancillary to guardianship administration. For further analysis of the representative payee system, see Part VII, "Analysis – Financial Claims of DSHS", below.

IV. ANALYSIS - "BEST INTERESTS"

"Best interests" strikes some as a phrase with an elusive meaning, but simply put it means doing what is best for the incapacitated person. A court views the decision of the guardian and the surrounding facts and circumstances. Certainly proof a direct benefit can be sufficient to

² Actions against the guardian are not contemplated here.

demonstrate the best interests have been served, but it has never been an exclusive rule. For argument, see *Lamb Supplemental Br.*, at 10-15.

The Guardians in this case applied the “best interests” standard to the content of advocacy by directly connecting it to the provision of care, treatment and services. CP 193. The Guardians determined that best interests are served by advocacy to prevent harm and damage now rather than litigation for damages later. CP 194-195. The Guardians determined that best interests are served by ongoing advocacy because of the nature of the governmental decision-making on care delivery system issues. CP 199. The best interests are served by the nexus of the advocacy with individual care needs of Mary Jane and each of the other residents for whom the Guardians act. CP 253; 284. There is no question that these determinations advance Mary Jane’s best interests and empower her as an individual.

V. ANALYSIS - ADVOCACY AND EMPOWERMENT

A. Background

Guardians are decision-makers and advocates, not caregivers or guarantors of care. Public policy supports empowerment and advocacy protecting rights of RHC residents. *Lamb Opening Br.*, at 6-13; *also see* argument at *Amended Reply*, CP 249-251. The Guardians’ decision-making and advocacy is inherent in the role of a guardian of the person

and follows from approval of a personal care plan. CP 375-380, 358-361. The Guardians' advocacy empowers Mary Jane's Constitutional right to petition government officials because she would otherwise be voiceless. See *ACLU Amicus Curiae Br.*, at CP 391-416.

The Guardians engage in advocacy at the Fircrest School level and direct advocacy at legislative officials, executive officials, and community organizations. CP 329-331. Details of advocacy are based on both individual and shared characteristics. CP 376. Each incapacitated person receives a direct and individualized benefit from advocacy. CP 377. Because of indigency, the pooling resources is the only practical way to provide a benefit. CP 282, 377. Preventing death and harm of residents such as those who were moved in the 2003-04 "downsizing" provides an individualized direct benefit. CP 194-195. For a full detailed description of advocacy activities, see CP 192-199; 253-258; 281-289; 375-378.

DSHS opposes the Guardians' exercise of these advocacy efforts as well as the *content* of the advocacy. DSHS policy is against paid guardianships for guardians who disagree with DSHS. CP 258.

B. Content of Advocacy.

The content of the advocacy is based on a reasonable, objective analysis of existing law with reference to Mary Jane's individual care needs. See *Guardians' Resp. Br. to DRW*, at CP 458-505. In summary,

RHC services are Constitutionally protected. Wash. const. Art. XIII. They provide a higher level of care: the ICF/MR provides “active treatment” and the NF provides specialized services for the intellectually disabled. RHC services are also federally protected as an entitlement. Individuals cannot be denied services there is they are otherwise eligible. Not only is consent required to lose the federal entitlement, federal law requires choice. A lower level of care and loss of federal entitlement is not a feasible alternative for these extremely vulnerable individuals. Ensuring that choice, consent, and preventing loss of her entitlement to services is in accord with this analysis and is in Mary Jane’s best interests.

The declarations filed by DSHS employees simply parrot the interests in DSHS and DRW, and are persuasively rebutted. CP 281-289; 257-258. For additional bases for the Guardians’ reasonable and objective analysis, see CP 458-813. The factual record demonstrates the Guardians’ content of advocacy is based on a reasonable, objective analysis of the law. DSHS and DRW arguments are based on what they desire the law to be, not what it is, without an explanation why the law should change.

C. Why Advocacy Is Necessary in Each Case

The following surrounding circumstances necessitate advocacy on Mary Jane’s behalf:

- Need for stable care delivery system. See, e.g., CP 254-257.

- Need for safe discharge to equal or better facilities. Until a concrete proposal is made, stability of care is of paramount concern. CP 254-257; 284-286.

- Need for high level of care for the most vulnerable. CP 193-194.

- 2004 downsizing, deaths and damages. CP 194; 256-257.

- Inadequate protection against abuse and neglect in community care programs. CP 916-963.

- Ongoing advocacy needed because of new state-level legislative initiatives threatening closure or dumping residents into lower levels of care without adequate safeguards. CP 195-195; 256; 964-976.

- Unfavorable political decisions threatening health, well-being, and lives. CP 198-199.

- Ongoing administrative budget cutting initiatives possibly affecting services to the resident. See, e.g., 906-914.

- Repudiation of Stakeholder's Agreement by DSHS and disabilities rights advocates, precluding further informal resolution. CP 823-903.

- Opposition of other disability rights advocates. CP 197-199.

- Protection of the Individual's Rights and Responsibilities. CP 904-905.

- Guardians' objectively reasonable belief the best interests have

been served in this case.

See also argument in *Lamb Supplemental Br.*, at 12-15.

D. A Direct Benefit Rule Should Not be Applied Exclusively.

The Court should apply a best interests standard of compensation for guardianship of the person. See argument in *Lamb Supplemental Br.*, at 10-15. Alternatively, the direct benefit rule should not be applied exclusively because its application is impractical. See argument in *Lamb Supplemental Br.*, at 7-10; *WAPG Amicus Brief*, at CP 1038-1043. One of the practical problems with the rule's application is its seeming requirement of some tangible result or success. However, advocacy is never futile so long as the voiceless are given a voice. See also generally *Lamb, Br. of Julian Wheeler Amicus Curiae*.

E. The Guardians Provided a Direct Benefit.

The first time the Guardians had the opportunity to create a record -- to show a direct benefit was conferred in the guardianship of the person -- was within the 10-day span available for reconsideration after *Lamb* was decided. The commissioner relied on *Lamb* in the Memorandum Decision. The Guardians asked the commissioner to reconsider and clarify the meaning of a direct or substantial benefit in light of *Lamb* and to determine that, in fact, a direct or substantial benefit was conferred in this case. The commissioner did neither, and instead granted the DSHS Motion

to Strike the Guardians' record on direct benefit. The Motion to Strike is improper and the order should be vacated. For argument, see *Response to Motion to Strike*, at CP 989-993, and *Motion to Revise*, at CP 1005-1005.

The record provided in the case and on reconsideration demonstrates a direct benefit was provided. See CP 191-200; CP 253-258; CP 281-289; CP 373-379. See also arguments in *Brief in Support of Motion for Reconsideration*, at CP 331-336; *Motion to Revise*, at CP 1005-1008.

F. The Guardian Fees for Advocacy are Reasonable.

Recall that these issues arose upon review of the Guardians' Report. At the time it was reviewed, the court had previously ordered (at the previous review or by separate order) an allowance from the federal benefit. Guardians are typically allowed to keep the allowance at the end of the process, especially when the activities are approved by the court in advance. See CP 375. In this case, the Guardians received advance permission to engage in advocacy activities and it was the policy of the Ex parte Department to approve such fees after the first case was adjudicated. See, e.g., CP 1892-1893; 2075-2076; 2151-2152. The only way advocacy is effective is to pool resources. CP 282-283. The Guardians' advocacy in this case has been effective. CP 257.

Calculation of the guardian fee advance is straightforward and was

never contested below. The benefit of advocacy is equally shared. Fees are calculated on monthly average of about 3 hours per month for Mary Jane and each of the others. CP 376-378. For individual characteristics, the benefit of advocacy is calculated monthly and allocated to each incapacitated person. Id. The total allowance required is more than \$500 monthly for Mary Jane based on an hourly rate of \$117.50 per month.

A monthly average calculation is sufficient because reporting periods differ for each incapacitated person, the number of residents served changes, and some residents die leaving no funds to compensate for services. CP 199.³

All the activities – individual, or shared equally – reported in the Reports and Declarations incurred time over \$ 500. CP 375-376. In addition, Alice L. Hardman provides additional uncompensated time of up to 20 hours per month. Id. Of all this time incurred, the Guardians requested an increase of the allowance from \$325 to \$ 400 per month per ward, giving the benefit of any doubt to Mary Jane. Id. The \$400 amount is not excessive viewed in light of the rates paid by the Office of Public Guardian. CP 822.

Ordering fee advances for the next reporting period is typically

³ The superior court had previously permitted the monthly average calculation. Given that there are no resources available to purchase software to implement complex fee splits, this calculation is reasonable.

based on the time incurred in the prior reporting period, absent some change in circumstances. The \$400 fee advance request for the current reporting period was reasonable as it was already discounted and, as discussed earlier, advocacy is ongoing. There was no issue in the court below that \$400 was too much for the guardianship services provided.

VI. ANALYSIS - COUNSEL FEES

A significant amount of counsel fees was incurred in both Lamb and McNamara. As mentioned earlier, fees for appointing a guardian are not an issue here. There are two other relevant components of fees: guardianship administration (such as fees associated with reports), and defending the guardianship against litigation and on appeal.

In the ordinary course of guardianship administration, guardian and counsel fees first come from the estate. RCW 11.96A.150. The theory is that the guardianship provides some benefit to the incapacitated person, and so that is who pays for it. If there are no available funds, generally guardian and counsel do not get paid.

However, when litigation is started by someone else, a guardian has a duty to defend, the fees incurred are necessary, and success or benefit is not a pre-requisite, though the fees still must be reasonable. For arguments, see *Amended Reply to DSHS Objection to Guardians' Fee Request* (11/10/2009), at CP 251-252; *Motion for Reconsideration*, at CP

345-346; *Motion to Revise*, CP 1008-1009. For amounts of fees, see *Declarations of Michael L. Johnson*, CP 290-291; 310-312; 994-995.

The Court Should Reject Exclusive Application of the “Unique Issues” and “Prevailing Parties” Rule in *Lamb* in Light of the Duty to Defend.

The “unique issues” rule at the trial court, and the “prevailing party” rule on appeal, as set forth in *Lamb*, are inconsistent with the duty to defend. Guardians must defend against valid (and invalid) claims of third parties, especially financial ones. More importantly, guardianship cases are based on unique fact patterns, and it just so happens that guardianships involving Medicaid are inherently complicated. Application of the rule is a disincentive to defending against valid claims when there are already limited resources and unique circumstances in every guardianship case. Similarly, the “prevailing party” rule discourages guardians from defending against claims of third parties on appeal. There is no reason in law or equity to restrict guardian and counsel fees in this fashion or to require guardians or their counsel to incur these fees in their individual capacity.

Defending against the DSHS financial claim does more than just ensure payment of counsel fees for ongoing guardianship administration. Counsel’s representation provides access to justice such that the voiceless can be heard through their guardian. The duty to defend against third party

claims is intended to redound to the best interests of the incapacitated person. Guardians and their counsel are not obligated to represent the incapacitated person's interests from their own pockets as *Lamb* suggests, and are entitled to payment for services that are reasonable and necessary.

How is this duty to defend realized in a case where there is little or no estate to compensate the guardian and counsel for litigation fees? The answer is RCW 11.96A.150, which states alternatives. In the event a third party claimant has a claim against an estate, and the estate lacks sufficient funds to pay for the defense of the estate, the third party claimant should compensate the guardian for defending against the claim pursuant to RCW 11.96A.150. Otherwise, IP's estate will be impoverished; the guardian is forced to abandon the duty to defend; the IP's best interests are impaired; and counsel for the guardian will withdraw.

In this case, the application of the alternative is warranted to avoid such consequences. Medicaid cases have small estates, and barely enough resources to pay for basic guardianship administration. If the estate is the only source for costs to defend the guardianship estate, the estate will be exhausted by litigation costs spread out over a long period of time with nothing left to pay for ordinary administration of the guardianship.

RCW 11.96A.150 allows for the circumstance when a third party claimant who has unlimited resources and will be paid regardless of

outcome will be required to pay for counsel for guardian's defense of the IP's rights brought about by such a claimant.

In this case, DSHS is the third party claimant bringing the litigation. This is a Medicaid case with limited resources which are or will be exhausted. The estate will be impoverished. DSHS has unlimited resources and its counsel is paid regardless of outcome. Guardian and counsel have incurred substantial time to defend Mary Jane's estate from claims and litigation brought by DSHS. For all the reasons above, guardians' counsel's fees should be paid by DSHS.

VII. ANALYSIS - THE DSHS CLAIM IS MERITLESS

A. Generally

Fircrest School is care provider and representative payee for Title II (and other federal benefits) belonging to Mary Jane. When it receives those funds, they are deposited into a "resident trust account". That account is set up specifically for the purpose of receiving those cash benefits and accounting for expenditures on behalf of a resident. CP 190. When the Office of Financial Recovery "recovers" funds from the account, they are deposited into the State General Fund, and are not expended on the care, maintenance or education of the resident. CP 191. Mary Jane has no other assets or income. *Id.* The balance of the resident trust account must remain below \$2,000 to maintain Medicaid eligibility.

B. Nature of the DSHS Claim.

The reduction in fees sought by DSHS – ostensibly from payment of financial responsibility – is really a claim for a court-ordered gift to the General Fund. The amount claimed by DSHS is not applied to cost of care. It is a gift to the General Fund and it provides no direct benefit to Mary Jane. In essence, DSHS seeks to reduce guardian and attorney fees to increase its gift to the General Fund.

For argument on DSHS lack of standing in the case, see *Amended Reply to DSHS Objection to Guardians' Fee Request* (11/10/2009), at CP 246-248; *Motion to Revise*, at CP 1002-1004. DSHS did not carry the burden of showing they have standing.

C. Statutes Governing Financial Claims for Cost of Care.

Guardianship cases have a claims procedure. RCW 11.92.035. Under the claims statute, guardian and counsel fees have priority over cost of care. *Id.* A more specific statute is provided for Medicaid clients who are required to pay for cost of care. RCW 11.92.180; Chapter 388-79 WAC. For arguments regarding the application of Chapter 388-79, see *Petition for Order Approving Guardians' Report and Directing Payment of Fees*, at CP 183; *Amended Reply to DSHS Objection to Guardians' Fee Request*, at CP 248; *Brief in Support of Motion for Reconsideration*, at CP 336; *Decl. of Tom O'Brien et al*, CP 313-328; *WAPG Amicus Brief*, at CP

1034-1038. The court is the final decision-maker concerning guardian and attorney fees. CP 815.

However, there is an even more specific statute on point which is applicable to the facts in this case. RCW 43.20B.410 et seq. The statute sets forth a procedure for determining the existence of a guardianship estate, and serving a notice and finding of financial responsibility. See, e.g., CP 380-390. This is the procedure for DSHS to use to pursue its financial claim. It is undisputed this procedure was not used. No financial responsibility or payment of participation was required. Thus, RCW 11.92.180 and Chapter 388-79 WAC don't apply.

Moreover, any DSHS financial claim against the guardianship estate is futile. There is no guardianship estate other than the resident trust fund it administers. Once a guardian of the estate is appointed, those funds are to benefit the incapacitated person and DSHS may not dip into them and pay itself for cost of care. RCW 71A.20.100(2), (5). Finally, a resident trust account cannot be used to pay for Medicaid services. WAC 388-835-0350. Nonetheless, DSHS still gets to take any amounts in the resident trust account over \$2,000 to ensure that the resident maintains Medicaid eligibility. There is no thus need for the court to reach any Medicaid law issues.

D. The DSHS Claim for Cost of Care is Without Merit.

For all the reasons above, there is no legal or factual basis for the DSHS assertion that guardian and counsel fees should be reduced from the amount owed for cost of care. No cost of care was established, much less owed, and even if it were, the State is prohibited by statute and regulation from paying itself from the resident trust account.

VIII. CONCLUSION.

The Guardians' services are necessary, provide a benefit to Mary Jane, and effectuate her Constitutional right to petition. The financial claim of DSHS is without merit. Its financial claim cannot operate to reduce guardian and counsel compensation. For these reasons and all the others set forth above, the Guardians request that the Court vacate the order denying revision, enter the Guardians' Proposed Orders, award guardian and counsel fees and costs, and grant such other relief as may be just and equitable.

March 2, 2011

Respectfully submitted,

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